United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4002

To be argued by
THOMAS H. BELOTE

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
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DANIEL FUSARO, CLERK
SECOND CIRCUIT

Docket No. 75-4002

CLAUDIO PEDRO BENAVIDES-PAREDES,
Petitioner,

—against—

THE IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

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THE IMMIGRATION AND NATURALIZATION SERVICE,
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BRIEF FOR RESPONDENT

Issues Presented

I

Was the Immigration Judge arbitrary and capricious in denying the petitioner's application to withhold his deportation to Chile, pursuant to Section 243(h) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1253(h), on the ground that he would be subject to persecution on account of political opinion?

II

Was the petitioner prejudiced by the Department of State's alleged involvement in Chile and its recommendation that petitioner not be granted refugee status?

III

Was the Immigration Judge arbitrary and capricious in denying petitioner the privilege of voluntary departure?

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act, 8 U.S.C. § 1105a, Claudio Pedro Benavides-Paredes petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on December 16, 1974. That order dismissed an appeal from a decision of an Immigration Judge finding the petitioner deportable pursuant to Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1), and denying his application for withholding of deportation or, in the alternative, voluntary departure.

Petitioner contends that the Board's order should be set aside because the denials of withholding of deportation and of voluntary departure were arbitrary and capricious, and because the Department of State was not a disinterested party in advising the Immigration and Naturalization Service that the petitioner would not be subject to political persecution in Chile.

Statement of Facts

The petitioner is an unmarried male, a citizen and native of Chile who entered the United States in January 1970 as a stowaway. He was not admitted or inspected by an immigration officer as required by Section 235(a) of the Act, 8 U.S.C. § 1225(a), when he left his ship in New York. Since the time of his entry he has been illegally residing and employed in the United States. The petitioner was apprehended when the North Tarrytown police stopped a vehicle which contained seven other illegal aliens on their way to work.

On September 23, 1973 the Immigration and Naturalization Service ("the Service") commenced deportation proceedings with the issuance of an Order to Show Cause and

Notice of Hearing, charging that the petitioner was deportable from the United States as an alien who was excludable at the time of entry, *i.e.*, a stowaway, pursuant to Section 212(a)(18), 8 U.S.C. § 1182(a)(18) (T. 14).*

On October 2, 1973 the petitioner made an administrative application for political asylum in the United States (T. 13) with a supporting affidavit describing political conditions in Chile (T. 12). In accordance with established procedures, 8 C.F.R. § 108, this matter was referred by the Service to the Department of State, Director of the Office of Refugee and Migration Affairs (T. 11), which found that the petitioner's claims of persecution were vague and unsubstantiated (T. 10). Accordingly, the District Director, on January 3, 1974, denied the petitioner's request for political asylum on the basis of information provided by the Department of State, the Service's administrative record, and all affidavits and evidence provided by the petitioner (T. 9).

At his deportation hearing on May 30, 1974 the petitioner, by his counsel, admitted the charges in the Order to Show Cause and conceded his deportability. He then applied for withholding of deportation on the ground of anticipated persecution on account of political opinion, pursuant to Section 243(h) of the Act, 8 U.S.C. § 1253(h), and in the alternative for voluntary departure, Section 244(e), 8 U.S.C. § 1254(e) (T. 6). The Immigration Judge denied his application for withholding of deportation because he found that the petitioner had not met the burden of establishing that he personally would be subject to persecution if he were to return to Chile. He also found that the petitioner was not deserving of the privilege of voluntary departure because he had entered the United States

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* References preceded by the letter "T" are to the tabs affixed to the certified administrative record previously filed with the Court.

by deliberate and deceptive efforts to avoid inspection procedures, and accordingly ordered his deportation to Chile (T. 5). On December 16, 1974 the Board of Immigration Appeals dismissed the petitioner's appeal from the decision of the Immigration Judge (T. 2).

The petitioner then filed the instant petition for review in this Court. By doing so he has enjoyed the mandatory stay of deportation pending determination of his petition. Section 106(a)(3), 8 U.S.C. § 1105a(a)(3).

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

> Section 243 8 U.S.C. § 1253—
>
> * * * * *
>
> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Regulation

Title 8, Code of Federal Regulations (CFR) § 242.17 Ancillary Matters, applications.

> * * * * *
>
> (c) Temporary withholding of deportation.
>
> * * * The respondent shall be advised that pursuant to section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer

and may be granted not more than ten days which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

* * *

ARGUMENT

POINT I

The Immigration Judge's denial of withholding of deportation was not arbitrary or capricious because it was based on clear and convincing evidence that petitioner would not be subject to persecution on account of political opinion.

The withholding of deportation in cases of anticipated persecution is a matter which rests entirely in the administrative judgment and opinion of the Attorney General and his delegates. The scope of review of such determinations is extremely narrow. *Muskardin* v. *Immigration and Naturalization Service,* 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz* v. *Shaughnessy,* 206 F.2d 392 (2d Cir. 1953). A petitioner who hopes to have a decision overturned must show that it is without a rational basis and is arbitrary, capricious, or an abuse of discretion. *Wong Wing Hang* v. *Immigration and Naturalization Service,* 360 F.2d 715 (2d Cir. 1966); *Rassano* v. *Immigration and Naturalization Service,* 492 F.2d 220 (7th

Cir. 1974); *Hosseinmardi* v. *Immigration and Naturalization Service,* 405 F.2d 25 (9th Cir. 1968). This Court has continuously reaffirmed the tenet that it will not substitute its judgment for that of the Immigration Judge; its review is limited to the single issue of whether there has been an abuse of discretion. *Muskardin* v. *Immigration and Naturalization Service, supra; Zupicich* v. *Esperdy,* 319 F.2d 773 (2d Cir. 1963).

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied on by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Fu* v. *Immigration and Naturalization Service,* 386 F.2d 750 (2d Cir. 1967), *cert. denied,* 390 U.S. 1003 (1968).

The petitioner testified that his father, mother, and brother are in Chile. His father is in the business of buying and selling cars, for which he has a license from the municipal government. His brother is also employed. No members of his family have been denied employment or been arrested because of their political activities. The petitioner was never involved in politics and was not a member of any political party. He stated that he came to the United States to work and earn money. These factors obviously do not form a sound basis on which to predicate a claim of persecution.

Under 8 C.F.R. 242.17(c), the petitioner has the burden of establishing that he would be subject to persecution.

MacCaud v. *Immigration and Naturalization Service,* 500 F.2d 355 (2d Cir. 1974). He must set forth the conditions relating to him personally which support his anticipation of persecution. *Fu* v. *Immigration and Naturalization Service, supra.* This the petitioner is unable to do. His evidence, consisting solely of bare conclusory statements, without factual support which might demonstrate the reasonableness of his belief that he will be persecuted, is insufficient. *Khalil* v. *District Director,* 457 F.2d 1276 (9th Cir. 1972); *Gena* v. *Immigration and Naturalization Service,* 424 F.2d 227 (5th Cir. 1970). In a similar case, this Court has found no abuse of discretion in denying withholding of deportation to a Yugoslav crewman who, like the petitioner, was never active politically, had never been in any trouble with the government or the police in Yugoslavia, and had never expressed any opposition to the Yugoslavian government, but who claimed to dislike communism. *Muskardin* v. *Immigration and Naturalization Service, supra.*

At the deportation hearing the alien spoke in broad generalities about the situation in Chile. Although he may in fact be opposed to the present government and quite understandably prefer life in the United States, the statute demands a determination based upon the probability of persecution of the petitioner himself, not of others. *Kovac* v. *Immigration and Naturalization Service,* 407 F.2d 102 (9th Cir. 1969). This is clear from the plain wording of the statute. In a case involving Chinese who applied for withholding of deportation, this Court stated:

> "Their status in Hong Kong as exiles from the mainland of China will not distinguish them from thousands of others, and the physical hardship or economic difficulties they claim they will face will be shared by many others. Those difficulties do not amount to the kind of particularized persecution that justifies a stay of deportation." *Fu* v. *Immigration and Naturalization Service, supra,* at 753.

The petitioner contends that in view of the oppressive climate which prevails in Chile, he would not be able to speak out against the government or would be subjected to punitive treatment if he did so. In *Matter of Surzycki,* 13 I. & N. Dec. 261 (1969), the Board of Immigration Appeals, which is the highest administrative appellate tribunal of the Immigration and Naturalization Service, held that:

> "There is no indication that the Congress enacted Section 243(h) of the Act with a view of guaranteeing an alien freedom of speech in the country of his nativity, and if he is not afforded this by his government, then it could be considered that he was being persecuted. We do not interpret Section 243(h) as covering this situation. There are many totalitarian governments in the world today which do not brook dissent of any nature. We do not hold that an alien who feels compelled to espouse in his native country beliefs which are looked upon with disfavor by his government is thereby being persecuted if the government acts against him." *Id.* at 262.

Matter of Sihasale, 11 I. & N. Dec. 531 (1966), does not support the petitioner's position. While the Board did state in that case that the petitioner's statements must be accorded the most careful and objective evaluation possible, it also reiterated the well-established rule that the Immigration Judge enjoys the advantage of seeing and hearing the petitioner; that he is in the best position to determine the accuracy, reliability, and truthfulness of the testimony; and that his evaluation thereof is entitled to great weight. Absent any arbitrariness or abuse of discretion, his decision should be allowed to stand.

It is submitted that the petitioner has not met the burden of proving that he would be singled out as an individual and persecuted upon his return to Chile and accordingly there was no abuse of discretion in denying him withholding of deportation on these grounds.

POINT II

The Department of State's alleged involvement in Chilean affairs is irrelevant because it in no way affected the decision in petitioner's case.

The question of whether or not the Department of State, in recommending against asylum for the petitioner, was a disinterested party because of its alleged role in subverting the Allende government in Chile is totally extraneous and irrelevant to the issue in this case. The petitioner first made application for asylum with the District Director for the Immigration and Naturalization Service. Under established procedures, if the District Director does not approve the claim, he forwards it to the Office of Refugee and Migration Affairs, Department of State, for an expression of its views. 8 C.F.R. § 108. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that petitioner did not have a valid persecution claim and the District Director, apparently concurring, denied the application and informed petitioner of his right to apply for withholding of deportation pursuant to Section 243(h) at his deportation hearing.

Subsequently the petitioner applied for withholding of deportation and his persecution claim was considered *de novo* by the Immigration Judge. Contrary to petitioner's assertion, the Immigration Judge did not request an expression from the Department of State concerning the likelihood of persecution. Rather, the trial attorney offered into evidence the letter from the Office of Refugee and Migration Affairs obtained earlier by the District Director and petitioner did not object to its introduction (T. 6). The letter was merely one piece of evidence considered by the Immigration Judge and was in no way binding on him.

In the past aliens have attacked decisions of the Immigration Judge and the Board of Immigration Appeals on

the ground that they were subject to the control of the Department of Justice and were incapable of rendering impartial decisions for that reason. These contentions have been rejected by the courts. *Marcello* v. *Bonds*, 349 U.S. 302 (1955); *Shaughnessy* v. *Accardi*, 349 U.S. 280 (1955); *Hosseinmardi* v. *Immigration and Naturalization Service*, *supra*. The Immigration Judge, although employed by the Department of Justice, is an independent hearing officer and his actions can be dictated by no one. If he is not even subject to the control of the department he is employed by, it is difficult to see how he can be controlled by the Department of State, with which he has no relationship at all.

The Immigration Judge made his decision based on the totality of the evidence, including the petitioner's testimony and the letter. The deportation hearing complied with all the requirements of a fair hearing. *Sung* v. *McGrath*, 339 U.S. 33 (1950). The petitioner was notified of the nature of the charge against him and of the time and place of the hearing. He was represented by counsel. He was given the opportunity to be heard and to introduce evidence and witnesses on his behalf. 8 C.F.R. 242.16. The decision was governed by and based upon only the evidence adduced at the hearing.

The decision of the Immigration Judge is supported by clear, convincing and unequivocal evidence. If the petitioner's persecution claim was rejected twice, once by the District Director and once by the Immigration Judge, it is not because of Government prejudice but rather because the claim is frivolous.

POINT III

The Immigration Judge did not abuse his discretion in denying petitioner the privilege of voluntary departure.

The granting of the privilege of voluntary departure is a matter of administrative grace and the burden is on the alien to establish eligibility therefor. Even so, the Service is not required to grant this relief to all aliens who meet the minimum legal standards, and discretion must still be exercised by the Attorney General and his delegates even if the alien is eligible. *Hintopoulos* v. *Shaughnessy,* 353 U.S. 72 (1957); *United States ex rel Exarchou* v. *Murff,* 265 F.2d 504 (2d Cir. 1959); *Vassiliou* v. *District Director,* 461 F.2d 1193 (10th Cir. 1972); *Khalaf* v. *Immigration and Naturalization Service,* 361 F.2d 208 (7th Cir. 1966). The scope of review of the denial of the privilege of voluntary departure is extremely narrow. The Court may not substitute its judgment for that of the Immigration Judge, but may only determine whether the manner in which the discretion was exercised was arbitrary or capricious. *United States ex rel Frangoulis* v. *Shaughnessy,* 210 F.2d 572 (2d Cir. 1954). *Fernandez-Gonzales* v. *Immigration and Naturalization Service,* 347 F.2d 737 (7th Cir. 1965).

The denial of the privilege of voluntary departure is fully warranted by the facts of this case. The petitioner has no strong equities on his side. His relatives are all in Chile. He used deliberate and surreptitious means to enter the United States without inspection. That this is his first violation of the immigration laws likewise does not weigh heavily in his favor, since this is his first and only coming to the United States, and every facet of it, from the moment of his entry into the territorial limits of the United States, has been in violation of law. It is somewhat incongruous for the petitioner to plead youth as a defense when he is nearly thirty years old.

Matter of Pimentel, 12 I. & N. Dec. 50 (BIA, 1967), cited by the petitioner, does not support his position. That case reiterated the decision in *Matter of P.,* 5, I. & N. Dec. 307 (BIA, 1953) that it is a matter of policy not to grant voluntary departure to an alien who enters the United States as a stowaway unless there are appealing factors in his case over and above statutory eligibility. It is submitted, therefore, that there has been no abuse of discretion in denying the petitioner the privilege of voluntary departure.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA # 75-4003

LILLIAN DICKSON being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 9 day of July 1973 he served a 3 copy 's of the within Brief for Respondents

by placing the same in a properly postpaid franked envelope addressed:

To WILLIAM OLTARSH ESQ
225 BROADWAY
NEW YORK NY

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lillian Dickson

Sworn to before me this
9 day of July 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977